No. 17-387

IN THE
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR THE CAYUGA NATION, THE SENECA NATION OF INDIANS, THE SAINT REGIS MOHAWK TRIBE, THE CHEROKEE NATION, AND THE PUEBLO OF POJOAQUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should this Court recognize a novel exception to tribal sovereign immunity for quiet-title actions like the one in this case on the ground that such actions are *in rem*?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. There Is No Exception from Sovereign Immunity for *In Rem* Actions, Including the Quiet-Title Action Here 5

A. *Bay Mills* Is the Starting Point, and Should Be the Ending Point, for Deciding Whether to Recognize a New "*In Rem*" Exception from Sovereign Immunity. 6

B. Settled Law Confirms that *In Rem* Actions Are Not Excepted from Sovereign Immunity. 9

C. This Settled Law Also Forecloses Creating an Exception from Sovereign Immunity for this Quiet-Title Action 13

D. The Claim that the Lundgrens Lacked Alternative Remedies Is Neither Relevant nor True. 17

E. *Yakima* Concerned States' Jurisdiction to Tax, Not Tribes' Immunity from Suit. 20

II. Because Actions Captioned "*In Rem*" Come in Many Different Types, the Court Should Not Create a Catchall *In Rem* Exception. 22

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Armijo v. Pueblo of Laguna, 247 P.3d 1119 (N.M. 2010) 26

Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992) 26

Blatchford v. Native Village of Noatak & Circle Village, 501 U.S. 775 (1991) 26

Block v. North Dakota ex rel. Board of University & School Lands, 461 U.S. 273 (1983) 18

Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co., 137 S. Ct. 1312 (2017) 11

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 23, 24

Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township, 2002 ND 83, 643 N.W.2d 685 (N.D. 2002) 23, 25

Cayuga Indian Nation of New York v. Seneca County, 761 F.3d 218 (2d Cir. 2014) ... 12, 13, 23, 24

Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004) 22

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 20, 21

FDIC v. Meyer, 510 U.S. 471 (1994) 15

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 11

First Bank & Trust v. Maynahonah, 313 P.3d 1044 (Okla. 2013) 23, 26

Georgia v. City of Chattanooga, 264 U.S. 472 (1924) 25

Hamaatsa, Inc. v. Pueblo of San Felipe, 388 P.3d 977 (N.M. 2016) 23

Honig v. Doe, 484 U.S. 305 (1988) 19

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 3, 13, 14, 17

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 14, 17, 20, 21

Miccosukee Tribe of Indians of Florida v. Department of Environmental Protection ex rel. Board of Trustees of Internal Improvement Trust Fund, 78 So. 3d 31 (Fla. Dist. Ct. App. 2011) 25

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 3, 6, 7, 8, 9, 11, 17, 20

Minnesota v. United States, 305 U.S. 382 (1939) 10, 14, 25

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) 20

Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 2

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 11

Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991) 18, 19, 21

Republic of Philippines v. Pimentel, 553 U.S. 851 (2008) 4, 15, 16

Shaffer v. Heitner, 433 U.S. 186 (1977) 11

The Siren, 74 U.S. (7 Wall.) 152 (1868) 9, 10

Tyler v. Court of Registration, 55 N.E. 812 (Mass. 1900) 11

United States v. Alabama, 313 U.S. 274 (1941) .. 10, 24

United States v. Brosnan, 363 U.S. 237 (1960) ... 14, 15

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 10

Virginia Office for Protection & Advocacy v. Stewart, 563 U.S. 247 (2011) 12, 13, 15, 24

Wisconsin Department of Natural Resources v. Timber & Wood Products Located in Sawyer County, No. 2017AP181, 2017 WL 6502934 (Wis. Ct. App. Dec. 19, 2017) 23, 24

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 2

STATUTES

28 U.S.C. § 2409a(a) 18

28 U.S.C. § 2409a(b) 18

OTHER AUTHORITIES

Brief of United States as *Amicus Curiae*, *Oneida Indian Nation of New York v. Madison County*, Nos. 05-6408, 06-5168, 06-5515 (2d Cir. July 25, 2008), 2008 WL 6086315 13

Letter Br. of United States as *Amicus Curiae*, No. 12-3723, *Cayuga Indian Nation v. Seneca County* (2d Cir. Sept. 30, 2013), Doc. 104-3 12

Restatement (Second) of Foreign Relations Law § 65 (1965) 25

INTEREST OF *AMICI CURIAE*[1]

The Cayuga Nation is a federally recognized Indian Nation, recognized as a sovereign Nation in myriad treaties with the United States, including the 1794 Treaty of Canandaigua.

The Seneca Nation of Indians is a federally recognized Indian Nation comprised of more than 8,000 citizens. Part of the historic Six Nations Confederacy, the Seneca Nation has been recognized as a sovereign by the United States since the time of its first treaties with the United States over 220 years ago.

The Saint Regis Mohawk Tribe is a federally recognized Indian Tribe with over 15,600 enrolled tribal members, recognized as a sovereign Nation by the United States in numerous treaties, including the 1796 Treaty with the Seven Nations of Canada.

The Cherokee Nation is the largest federally recognized Indian Tribe, with more than 360,000 enrolled citizens. The Cherokee Nation has been recognized as a sovereign Nation by the United States in numerous treaties, including the 1791 Treaty of

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Holston and the 1866 Treaty with the Cherokees. *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The Pueblo of Pojoaque is a federally recognized Indian Tribe, and one of the historic Indian Pueblos of New Mexico, whose sovereign status has been successively recognized over hundreds of years by the Spanish, Mexican, and United States governments. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240 (1985).

Each of these *amici*—as Indian Nations whose status as separate sovereigns long predates the Constitution—has a strong interest in defending the doctrine of tribal sovereign immunity recognized by this Court's precedents as an essential corollary of their sovereign status. That interest includes defending the doctrine of tribal sovereign immunity against attempts, as in the decision below, to create an exception for *in rem* actions. As an incident of tribal sovereignty, each *amicus* has significant interests in property held by the Tribe itself, which at times has been held by the Tribe for hundreds if not thousands of years. Like other sovereigns, each of the *amici* has a strong interest in the interplay between the doctrine of sovereign immunity from suit and claims that may be made with respect to property, including various claims that may be characterized as actions *in rem*. Each *amicus* regularly defends against incursions on its sovereignty by state and local governments and private parties, including with respect to property held by the Tribe. *Amici* thus have strong interests in defending tribal sovereign immunity in *in rem* actions.

SUMMARY OF ARGUMENT

I. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), reaffirmed that the "baseline position ... is tribal immunity," unless a Tribe waives immunity or Congress abrogates it. *Id.* at 2031. The Court "declined" to begin carving out exceptions, explaining that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Id.* at 2037. The Court should reject the novel *in rem* exception that the Washington Supreme Court created. That exception is without support in this Court's precedents on tribal sovereign immunity. It contradicts this Court's precedents concerning the immunity of the United States and other sovereigns, which recognize that—in every way that matters—a suit against a sovereign's property is a suit against the sovereign. And it is at odds with *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), which held that suits seeking relief that is "the functional equivalent of quiet title" are barred by sovereign immunity. *Id.* at 282. These bedrock principles foreclose any exception from tribal sovereign immunity for *in rem* actions, including the exception for quiet-title actions created by the Washington Supreme Court.

The opinion below rests its contrary rule on a sleight of hand: Washington courts first make "a merits-based determination" about whether a Tribe owns the property. Pet. App. 2a. If not, immunity supposedly is no bar because the action cannot "deprive [the Tribe] of land [it] rightfully own[ed]." Pet. App. 11a (quotation marks omitted). But immunity cannot be dodged by creating a threshold step that asks whether the

otherwise immune defendant (here, the Upper Skagit Indian Tribe) loses on the merits. Indeed, the Court rejected precisely that approach in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), holding that lower courts cannot avoid sovereign immunity by asking, as a threshold question of joinder, whether the sovereign's "claims ha[ve] ... little likelihood of success on the merits." *Id.* at 860. Such "consideration of the merits [i]s itself an infringement on ... sovereign immunity." *Id.* at 864.

The Lundgrens cannot avoid this result by asserting that they lack adequate alternative remedies. To begin, the Lundgrens *have* alternative remedies they could have invoked. And more fundamentally, it is for Congress to decide whether remedies are truly inadequate, and to provide a solution calibrated to any problem it perceives. For decades, litigants likewise claimed that the United States' immunity from quiet-title suits left them with no sure remedy. In the Quiet Title Act of 1972, Congress addressed those concerns by waiving the United States' sovereign immunity—not a blanket waiver, but one with numerous carve-outs and restrictions that protected the United States' sovereign interests. The Court should reject the attempt to bypass Congress's designated role and to treat Indian Tribes differently from other sovereigns.

II. As unpersuasive as the Washington Supreme Court's theory is on the facts here, it cannot possibly justify a broad-based *in rem* exception to tribal sovereign immunity—because the theory does not even *apply* to many types of *in rem* actions litigated across the country. *In rem* actions come in many shapes and

sizes. In some actions, for example, a State or local government may seek to foreclose on tax liens on tribal property. In other actions, a State may seek to acquire tribal property via condemnation. And in still other actions, a plaintiff will file a quiet-title proceeding alleging an ownership interest that arose *after* the Tribe acquired the property. All of these actions indisputably would "deprive [the Tribe] of land [it] rightfully own[ed]," Pet. App. 18a, and would thus fall outside the Washington Supreme Court's newly minted exception. As this Court considers *in rem* jurisdiction's intersection with tribal sovereign immunity, it should be mindful that this case arises on unusual facts that render this case an exceptionally poor vehicle for considering a general *in rem* exception.

ARGUMENT

I. There Is No Exception from Sovereign Immunity for *In Rem* Actions, Including the Quiet-Title Action Here.

The court below held that courts may entertain quiet-title actions that eliminate a sovereign Indian Nation's claims to property "[b]ecause courts exercise *in rem* jurisdiction over [the] property," and thus "the Tribe's sovereign immunity is no barrier." Pet. App. 2a, 10a. But there is no exception from tribal sovereign immunity for actions captioned "*in rem*," and the Court should not create one.

A. *Bay Mills* Is the Starting Point, and Should Be the Ending Point, for Deciding Whether to Recognize a New "*In Rem*" Exception from Sovereign Immunity.

This Court's consideration of the Washington Supreme Court's *in rem* exception begins, and should end, with its recent decision in *Bay Mills*. That case considered another proposed exception from sovereign immunity, for "suit[s] aris[ing] from off-reservation commercial activity." 134 S. Ct. at 2028. *Bay Mills*' rejection of that exception compels the same result here.

As *Bay Mills* explained, "[t]he baseline position, [the Court has] often held, is tribal immunity." *Id.* at 2031. Indian Tribes are "separate sovereigns pre-existing the Constitution." *Id.* at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). And while Indian Tribes have become "'domestic dependent nations,'" they continue to "exercise 'inherent sovereign authority.'" *Id.* (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). One of these "core aspects of sovereignty that tribes possess ... is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 58). This immunity is "a necessary corollary to Indian sovereignty and self-governance," *id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)), given the recognition—dating to the Founding—that it "is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *Id.* (quoting The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton)).

As the Court reaffirmed in *Bay Mills*, there are only two exceptions: where "Congress has authorized [a] suit," and where the Tribe has "waived" its immunity. *Id.* at 2032; *see id.* at 2030–31 ("[W]e have time and again dismissed any suit against a tribe absent congressional authorization (or a waiver)."). Repeatedly, the Court has had the chance to exempt various types of actions from this immunity—for example, conduct "off [the Tribe's] reservation," or "commercial conduct." *Id.* at 2031 (alteration in original) (internal quotation marks omitted). But repeatedly, the Court has declined, "establish[ing] a broad principle" of sovereign immunity "from which [the Court] thought it improper suddenly to start carving out exceptions." *Id.* (citing *Okla. Tax Comm'n*, 498 U.S. at 509; *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 167–68, 172–73 (1977); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)).

In *Bay Mills*, Michigan nonetheless asked the Court to "revisit" that principle, asserting that Tribes' broad sovereign immunity was unwarranted given that "tribes increasingly participate in ... commercial activity, and operate in that capacity less as governments than as private businesses." *Id.* at 2036. Michigan complained that Tribes should not have "broader immunity ... than other sovereigns," including States and "foreign nations[]" after the Foreign Sovereign Immunities Act. *Id.*

The Court rejected that request "for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty that tribes

retain—both its nature and its extent—rests in the hands of Congress." *Id.* at 2037. Congress, *Bay Mills* explained, "has the greater capacity to 'weigh and accommodate the competing policy concerns and reliance interests.'" *Id.* at 2037–38 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)). Hence, "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Id.* at 2039. The Court therefore declined to create a "freestanding exception to tribal immunity," which "would entail both overthrowing our precedent and usurping Congress's current policy judgment." *Id.*

Bay Mills dictates the same result here. The Lundgrens do not argue that the Upper Skagit Indian Tribe waived its immunity, and there is no claim that "Congress has authorized [this] suit" by abrogating sovereign immunity for *in rem* actions generally or quiet-title suits in particular. *Id.* at 2032. Instead, the Lundgrens persuaded the Washington Supreme Court to create an exception grounded in what that court viewed as the "equitable purposes" of its state-law rules of civil procedure, regarded by that court as a relatively "less intrusive assertion of state jurisdiction." Pet. App. 9a, 18a (internal quotation marks omitted). But this type of "policy judgment" is precisely what *Bay Mills* reserved for *Congress* and refused to allow courts to "usurp[]." 134 S. Ct. at 2039. As this Court observed in *Bay Mills*, Congress is active in policing the boundaries

of Indian sovereign immunity and has every ability to address any genuine problem. *See id.* at 2038.[2]

B. Settled Law Confirms that *In Rem* Actions Are Not Excepted from Sovereign Immunity.

The Washington Supreme Court believed that when "there [i]s *in rem* jurisdiction," a court does "not need to address sovereign immunity," and that this Court's settled sovereign-immunity precedent culminating in *Bay Mills* is simply inapplicable. Pet. App. 10a. The court was wrong. A mountain of caselaw establishes that sovereign immunity does not become inapplicable simply because a plaintiff characterizes its suit as an *in rem* action against the sovereign's property.

This Court has so held in cases involving property of the United States. Since the nineteenth century, this Court has recognized that "[t]he same exemption" that bars suits against the United States "extends to the property of the United States, and for the same reasons." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). That is because "there is no distinction between suits

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[2] Indeed, if an exception from sovereign immunity were warranted for some *in rem* cases, only Congress could define its scope. Actions captioned "*in rem*" are no monolith; they come in many different types. *See infra* Part II. While Congress can carefully limit the scope of exceptions it enacts, that is not feasible for judicially created exceptions. An exception for one *in rem* action would immediately invite litigation over what *other* actions fall into that exception (or what other exceptions should be created)—opening up a new, broad front of litigation on tribal sovereign immunity. This Court has wisely declined to start down that path.

against the government directly, and suits against its property." *Id.*

Thus, when Alabama sued to foreclose tax liens on federally owned lands, this Court held that those proceedings "were void," explaining that a "proceeding against property in which the United States has an interest is a suit against the United States." *United States v. Alabama*, 313 U.S. 274, 282 (1941).

Likewise, when Minnesota sought to condemn land for which "the United States owns the fee," the United States was "an indispensable party defendant" because—again—a "proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota v. United States*, 305 U.S. 382, 386 (1939). And because immunity prevented joining the United States, "Minnesota [could] not maintain [its] suit." *Id.* at 387.

More recently, when a bankruptcy trustee argued that "a bankruptcy court's *in rem* jurisdiction overrides [the United States'] sovereign immunity," this Court rejected that argument, explaining that "we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992). A proceeding against a sovereign's property, as here, no less offends immunity than one against its money.

These decisions are based on a commonsense, functional point. While *in rem* suits are formally suits against things, they are *really* suits against the people who claim interests in those things. In this Court's words, the "phrase judicial jurisdiction over a thing is a

customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (quoting *Restatement (Second) of Conflict of Laws* § 56, Introductory Note (1971)). Thus, "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." *Id.* at 207 n.22 (quoting *Tyler v. Court of Registration*, 55 N.E. 812, 814 (Mass. 1900) (Holmes, C.J.)). *In personam* proceedings seek merely to "establish a claim against some particular person," while *in rem* proceedings do so against "any one in the world." *Tyler*, 55 N.E. at 814. That is why, for example, the Constitution requires that any owner, including an Indian Nation, be notified of an *in rem* suit against its property. *See Shaffer*, 433 U.S. at 206 (collecting cases); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 312–13 (1950) (due-process notice requirements do not depend on whether litigation is *in personam* or *in rem*).

Indeed, the "preeminent purpose of ... sovereign immunity is to accord ... the dignity that is consistent with ... status as sovereign entities," recognizing that it is an "impermissible affront to [this] dignity to be required to answer the complaints of private parties in ... courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *accord Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318–19 (2017) (same, as to foreign states); *Bay Mills*, 134 S. Ct. at 2042 (Sotomayor, J., concurring) (same, as to Indian Tribes). In every way that matters, *in rem* suits—just like *in personam* suits—have this effect. When a sovereign Indian Nation receives notice

of an *in rem* action against its property, its only choice is no choice at all: appear and defend, or risk forfeiting property. As this Court has observed, a sovereign is "effectively" "haled into court without its consent ... when ... the object of the suit ... is to reach funds in the ... treasury or acquire ... lands." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) (*VOPA*). This basic point forecloses the Washington Supreme Court's attempt to circumvent immunity via *in rem* jurisdiction.

Consistent with these principles, the United States has correctly recognized, in an *amicus* brief filed in a suit concerning the Cayuga Nation, that there is no *in rem* exception from tribal sovereign immunity. There, a county alleged that the Nation owed property taxes, and it "initiated foreclosure proceedings against certain of the ... Nation's real property." *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. 2014). Immunity was no barrier, the county urged, because of "a distinction between *in rem* and *in personam* proceedings." *Id.* at 221. But the United States explained that "the '*in rem*' nature" of a foreclosure action does not "bear[] on Cayuga's immunity from suit." Letter Br. of United States as *Amicus Curiae* at 4, No. 12-3723, *Cayuga Indian Nation v. Seneca Cty.* (2d Cir. Sept. 30, 2013), Doc. 104-3. The United States deemed "untenable" the "premise that tribal immunity from suits exists only as to *in personam* suits," and it found "no support for the proposition that sovereign immunity is generally inapplicable to *in rem* actions." *Id.* at 5, 8.

The Second Circuit agreed. *Cayuga Indian Nation*, 761 F.3d at 221.[3]

C. This Settled Law Also Forecloses Creating an Exception from Sovereign Immunity for this Quiet-Title Action.

These principles equally foreclose the Washington Supreme Court's view that quiet-title suits may proceed despite an Indian Tribe's assertion of sovereign immunity. These suits, too, inflict the "specific indignity against which sovereign immunity protects"—the Tribe is "haled into court without its consent," on pain of otherwise forfeiting property. *VOPA*, 563 U.S. at 258.

Indeed, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), this Court was express that sovereign immunity bars quiet-title suits involving a sovereign's property. *Coeur d'Alene* held that a Tribe could not seek "declaratory and injunctive relief" concerning lands claimed by the State because such "relief ... is ... the functional equivalent of quiet title" barred by sovereign immunity. *Id.* at 282–83. A three-Justice concurrence agreed that the "Tribe could not maintain a quiet title action ... without the State's consent" because a "court cannot summon a State before it in a private action

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[3] The United States' position was consistent with its brief in a prior case concerning the Oneida Indian Nation of New York. *See* Br. of United States as *Amicus Curiae* at 10 n.4, *Oneida Indian Nation of N.Y. v. Madison Cty.*, Nos. 05-6408, 06-5168, 06-5515 (2d Cir. July 25, 2008), 2008 WL 6086315 ("[E]xcept in certain bankruptcy and admiralty contexts that are not applicable here, the distinction between *in personam* and *in rem* jurisdiction is meaningless with regard to sovereign immunity.").

seeking to divest the State of a property interest." *Id.* at 289 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and concurring in the judgment). This rule is no less applicable to the property of Indian Tribes.

The Washington Supreme Court tried to dodge this clear law via Washington-specific legal fictions. It reasoned that, if a quiet-title plaintiff has a *winning* adverse-possession claim, the Tribe "does not have an interest in the disputed property." Pet. App. 2a. Thus, the court reasoned, "sovereign immunity is no barrier." *Id.* Moreover, the court proposed to undertake this entire "merits-based determination" via Washington's mandatory-joinder rules, *id.*—finding that if the quiet-title plaintiff would prevail, the Tribe was not a "necessary" (much less an "indispensable") party. Pet. App. 13a–14a. By embedding the merits determination in a threshold question about joinder, the court sought to avoid the "jurisdictional barrier[]" that it conceded tribal sovereign immunity would otherwise present. Pet. App. 13a.

That dodge cannot work. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). As to the United States' immunity, this Court has observed that "whether or not the United States is an indispensable party to a judicial proceeding" concerning property in which the United States claims an interest "cannot depend on state law." *United States v. Brosnan*, 363 U.S. 237, 251 (1960). Instead, as a matter of federal law, the "United States is an indispensable party defendant" to any such suit. *Minnesota*, 305 U.S. at 386; *accord Brosnan*, 363 U.S. at

242–43. Likewise, Washington cannot avoid Indian Tribes' sovereign immunity by rearranging its civil procedures.

As legal fictions go, moreover, Washington's is particularly untenable. Even the court below confessed that its approach "put 'the cart before the horse.'" Pet. App. 13a. Sovereign immunity from suit restricts courts' very jurisdiction, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), protecting sovereigns—as just noted—from "being haled into court ... when ... the object ... is to reach ... [the sovereign's] lands." *VOPA*, 563 U.S. at 258. Such immunity is empty if, to establish it, sovereigns must first litigate *and win* on the merits—losing their property if they do not. It cannot possibly matter that the Washington Supreme Court captioned its "merits-based determination" as one under Washington's "Civil Rule 19." Pet. App. 2a, 13a.

Indeed, the Court rejected precisely this approach in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). There, an interpleader action concerning property claimed by the Republic of the Philippines went forward despite the Philippines' assertion of sovereign immunity. *Id.* at 854–55. Applying Rule 19's joinder rules, the lower courts believed that the action could proceed without the Philippines because its "claims had so little likelihood of success on the merits." *Id.* at 860. This Court, however, held that the lower courts had "erred, ... in effect decid[ing] the merits of the [Philippines'] claims." *Id.* at 864. This "consideration of the merits was itself an infringement on ... sovereign immunity." *Id.* To be sure, the Court stressed, courts might properly "disregard [a] frivolous claim" by a

sovereign. *Id.* at 867. But "[h]ere, the claims of the [sovereign] are not frivolous; and the [lower courts] should not have proceeded on the premise that those claims would be determined against the sovereign." *Id.*; *see also id.* at 868 ("[I]t was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by [a sovereign] that was entitled by its sovereign status to immunity from suit.").

Pimintel forecloses the Washington Supreme Court's approach below. While that court believed that the Upper Skagit would lose on the merits, there is no finding that the Upper Skagit's claims of ownership based on a statutory warranty deed are *frivolous*. Pet. App. 3a. And the Washington Supreme Court's joinder analysis, set forth at pages 14a through 16a of the Petition Appendix, is *indistinguishable* from the merits resolution of an adverse-possession claim; indeed, the court expressly characterized it as a "summary judgment" analysis. Pet. App. 14a. As *Pimintel* recognized, if the doctrine of sovereign immunity is to have any meaning, it must forbid importing a merits decision into threshold questions of joinder.[4]

If any doubt remained, *Coeur d'Alene* demonstrates that the Washington Supreme Court's fiction is not the law. *Coeur d'Alene*, as noted, explained that sovereign immunity would bar a quiet-title action brought by a Tribe against a State. *See supra* at 13. In *Coeur d'Alene*,

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[4] *Pimintel*'s rule also disposes of concerns that Tribes will use their immunity in bad faith, claiming ownership of property with no genuine basis and then asserting immunity to preclude challenges. Frivolous claims need not be credited. *See* 553 U.S. at 867–68.

the Tribe relied, in part, on "claimed ownership of the submerged lands pursuant to unextinguished aboriginal title." 521 U.S. at 265. So the Tribe could claim, like the Lundgrens, that the State really had "no interest" and thus "sovereign immunity [wa]s no barrier." Pet. App. 2a, 13a–14a. But in *Coeur d'Alene*, this Court did not find that this claim rendered sovereign immunity less of a barrier. And here, the Lundgrens' similar claim is no more relevant.

D. The Claim that the Lundgrens Lacked Alternative Remedies Is Neither Relevant nor True.

The Lundgrens at the petition stage, and the Washington Supreme Court below, made much of the claim that the Lundgrens lacked alternative remedies. Br. in Opp. 7 (asserting that "[t]he only remedy" the Lundgrens had was the "narrow state law remedy" of a quiet-title action); Pet. App. 17a (asserting that the Lundgrens had no other "adequate remedy"). But while *Bay Mills* indeed stated that the Court there "need not consider" the result if no existing cause of action provided a remedy, 134 S. Ct. at 2036 n.8, this Court's precedent supplies a clear answer in those circumstances too. When a litigant claims it has "a right without any remedy" due to sovereign immunity, the *remedy* is to "seek appropriate legislation from Congress." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 514 (1991); *see Bay Mills*, 134 S. Ct. at 2030–31 (similar); *Kiowa*, 523 U.S. at 758 (similar).

That point is evident from the history of the federal government's immunity to quiet-title actions. "Only

upon passage of the [Quiet Title Act] did the United States waive its immunity with respect to suits involving title to land." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983). Before that, private landowners made the same claims as the Lundgrens, stressing that they had no sure remedy; their only "means of obtaining a resolution of the title dispute" was "to induce the United States to file a quiet title action against them, or ... petition Congress or the Executive for discretionary relief." *Id.* And when Congress finally waived the United States' immunity in 1972, it did not do so wholesale. Congress limited the waiver by, for example, requiring that quiet-title actions be brought in federal court and by providing the United States the option to pay compensation in lieu of surrendering ownership. 28 U.S.C. § 2409a(a)–(b).

This history confirms that the Washington Supreme Court went astray when it invented an *in rem* exception to sovereign immunity for quiet-title actions. It has *always* been true that sovereign immunity complicates disputes regarding property ownership. If the complications prove intolerable, the answer is to seek legislation from Congress, as with the Quiet Title Act—giving Congress the opportunity to weigh the competing policy concerns regarding Indian lands. *Cf. Block*, 461 U.S. at 283. The position of the Lundgrens and the Washington Supreme Court, at bottom, is that Indian Tribes should be treated *differently* from other sovereigns—with their immunity judicially abrogated, bypassing the authority vested in Congress to determine whether, and to what extent, a limit on immunity is appropriate. The Court should reject this

attempt to create an Indian-only exception from bedrock immunity principles.

In any event, the claim that the Lundgrens lack alternative remedies is not even true. As the Upper Skagit show, the Lundgrens did have alternative remedies, including 50 years to file a quiet-title suit before the Upper Skagit purchased the property, and today, state-law claims for money had and received and for unjust enrichment. *See* Pet'r's Br. 35–36 (citing cases). Predictably, the Lundgrens will say that these alternatives are less effective. But as the foregoing discussion demonstrates, often "sovereign immunity bars ... the most efficient remedy." *Okla. Tax Comm'n*, 498 U.S. at 514. Yet immunity applies all the same. *Id.*

Nor can the Lundgrens prevail by seeking to sow doubt over whether, on the facts here, particular remedies would be available under Washington law. The Lundgrens did not even *attempt* to invoke the remedies they now claim are inadequate. This quiet-title action was their first and only stop. Even in the context of exhaustion of administrative remedies, a party that failed to exhaust must do more than assert that administrative remedies *might* be futile. "The burden ... rests with th[at party] ... to demonstrate" that *in fact* "administrative review" would have been "futil[e]." *Honig v. Doe*, 484 U.S. 305, 327 (1988). That is all the more true where the interests at stake are not administrative procedures, but tribal sovereignty and the "special justification" needed before this Court will consider abandoning its precedent recognizing the categorical sovereign immunity held by Indian Tribes,

absent waiver or congressional abrogation. *Bay Mills*, 134 S. Ct. at 2036 n.8 (quotation marks omitted).

E. *Yakima* Concerned States' Jurisdiction to Tax, Not Tribes' Immunity from Suit.

The Washington Supreme Court believed, incorrectly, that its *in rem* exception from sovereign immunity found support in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 264–65 (1992)—in particular, the statement that "because the jurisdiction [in *Yakima*] [wa]s *in rem* rather than *in personam*, it ... assuredly" did not produce the "'checkerboard' effect" condemned by the Court's prior opinion in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and "it is not impracticable either." *Yakima*, 502 U.S. at 264–65; *see* Pet. App. 8a–9a.

Parsing this statement requires a deep dive into *Yakima* and *Moe*—ably provided in the Upper Skagit's brief, *see* Pet'r's Br. 17–22, and which *amici* will not repeat. But no such excursion is necessary to see why *Yakima*'s statement is inapplicable here. Two different doctrines can protect Indian Tribes, as sovereigns, from States' reach. First, States in some circumstances lack jurisdiction "to apply their substantive laws to tribal activities"—in which case, States are forbidden from imposing mandates on Tribes *at all*. *Kiowa*, 523 U.S. at 755. Second, Tribes also possess sovereign "immunity from suit." *Id.* This sovereign immunity is entirely independent from the limits on States' regulatory jurisdiction: A "State may have authority to [apply its] laws to [a Tribe's] off-reservation conduct," yet the Tribe may still "enjoy[] immunity from suit" to enforce

compliance with those laws. *Id.*; *cf. Okla. Tax Comm'n*, 498 U.S. at 514 (noting concerns that, in combination, these rules can give States "a right without any remedy").

Yakima concerned only the first limit, on States' regulatory jurisdiction. The question presented was whether "the County ... may *impose* an ad valorem tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land." 502 U.S. at 253 (emphasis added). *Yakima*'s statement about *in rem* jurisdiction came solely in answering this question. This case, however, concerns the second limit—sovereign immunity from suit. There "is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The Washington Supreme Court erred in interpreting a statement about the first limit as resolving a question under the second.[5]

To be sure, *Yakima*'s recitation of the procedural history noted that the county had "proceeded to foreclose on properties ... for which [these] taxes were past due." 502 U.S. at 256. But the Tribe did not raise sovereign immunity as a defense. This Court properly does not regard its prior cases as establishing precedent concerning "[q]uestions which merely lurk in the record, neither brought to the attention of the [C]ourt nor ruled

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[5] This Court has sometimes characterized the limit on States' jurisdiction to regulate Tribes as an "immunity." *See, e.g., Yakima*, 502 U.S. at 259. But regardless of the label used, the point is the same. These limits are different, each independent of the other.

upon." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quotation marks omitted).

II. Because Actions Captioned "*In Rem*" Come in Many Different Types, the Court Should Not Create a Catchall *In Rem* Exception.

This case should end with the fundamental point that no *in rem* exception from sovereign immunity exists, and *Bay Mills* forbids the Court from creating one. But as this Court considers *in rem* jurisdiction's intersection with tribal sovereign immunity, it should be mindful that this case arises on unusual facts that render this case an exceptionally poor vehicle for considering a broad-based *in rem* exception.

The Washington Supreme Court held that the Lundgrens had "acquired ownership by adverse possession long *before* the property was purchased by the Tribe," deeming this case comparable to one where the Tribe "never possessed the land" or had recognized ownership rights free from the Lundgrens' claims. Pet. App. 11a, 14a.[6] Those assertions are what allowed the Washington Supreme Court to aver that the Upper Skagit had "no interest" recognized in the law, and thus "never had land to lose." Pet. App. 11a, 13a. As explained above, that fiction is untenable even on this case's facts. *See supra* at 14-16. And regardless, the Washington Supreme Court's approach cannot justify a general *in rem* exception. Indeed, the Washington Supreme Court's theory does not even purport to *apply*

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[6] To be clear, however, *amici* do not understand the Washington Supreme Court to have found as fact that the Upper Skagit never had possession of the land at issue.

in most circumstances where courts address *in rem* jurisdiction's intersection with sovereign immunity.

In rem cases come in many flavors, each raising different arguments. Some determine ownership, confirming some property interests while destroying others. Such cases can arise as quiet-title actions, but also in interpleader and actions seeking injunctions or declaratory judgments. *See, e.g., Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 984 (N.M. 2016) (declaratory judgment); *First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1045 (Okla. 2013) (interpleader). In others, tribal property is sought to be acquired for public use via eminent domain. *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 693–94 (N.D. 2002). In still others, a State claims that the Tribe owes unpaid taxes and seeks to enforce the alleged liability by foreclosing on liens on tribal property. *Cayuga Indian Nation*, 761 F.3d at 220; *Wis. Dep't of Nat. Res. v. Timber & Wood Prods. Located in Sawyer County*, No. 2017AP181, 2017 WL 6502934, at *1 (Wis. Ct. App. Dec. 19, 2017). Such actions, too, can concern not just real property, but personal or intangible property. *See, e.g., id.* (timber and wood products); *First Bank & Tr.*, 313 P.3d at 1045 (bank accounts).

What these diverse cases share is that in virtually none of them is there even a colorable argument that the Tribe had "no interest" recognized in the law, and thus "never had [anything] to lose." Pet. App. 11a, 13a. Instead, in nearly all cases, Tribes have a possession interest or recognized ownership interest that long predates the *in rem* suit. *Cf. California v. Deep Sea*

Research, Inc., 523 U.S. 491, 507 (1998) (in admiralty context, States' sovereign immunity extends where "State possess[es] the disputed res").[7]

Foreclosure and condemnation cases are particularly clear examples. In foreclosure cases, it is typically undisputed that the Tribe owns the property and the State is trying to *take* it. *See, e.g., Cayuga Indian Nation*, 761 F.3d at 220 (county attempting to "foreclos[e] upon certain real property owned by ... the Cayuga Indian Nation"). As noted, the law is clear that the United States' immunity bars similar foreclosure actions. *See Alabama*, 313 U.S. at 281–82.

Indeed, sovereign immunity's application is especially clear as to foreclosure suits because they are merely stand-ins for suits that name Tribes directly. Foreclosure cases arise when Tribes allegedly owe a sum of money. *E.g., Cayuga Indian Nation*, 761 F.3d at 220; *Wis. Dep't of Nat. Res.*, 2017 WL 6502934, at *10–11. Rather than sue the Tribes directly—suits sovereign immunity would obviously bar—States and their subdivisions attempt to collect by extracting the same amount from tribal property. Sovereign immunity prohibits suits whose object is to "reach funds in the [sovereign's] treasury or acquire [its] lands," *VOPA*, 563 U.S. at 258-59, and it certainly prohibits States from

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[7] *Deep Sea Research* does not hold that, outside of admiralty, immunity applies *only* where the property is in the sovereign's possession. Its possession requirement stemmed from the "interaction between the Eleventh Amendment and the federal courts' *in rem* admiralty jurisdiction." 523 U.S. at 502. It does, however, make clear that immunity applies *at least* where the sovereign has possession.

acquiring a sovereign's lands as a *substitute* for reaching funds in its treasury. Thus, before the Foreign Sovereign Immunities Act narrowed foreign states' immunity in 1976, the *Restatement (Second) of Foreign Relations Law* could proclaim that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Restatement (Second) of Foreign Relations Law* § 65 cmt. d (1965).

Condemnation is another strong case. Condemnation proceedings likewise acquire—they take—interests in land concededly owned and possessed by the sovereign. *Cf. Minnesota*, 305 U.S. at 386 (The United States "is confessedly the owner of the fee of the Indian allotted lands.... As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party."). So, even on the theory adopted by the Washington Supreme Court, tribal sovereign immunity would bar such suits. *See id.*[8]

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[8] States sometimes argue that *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924)—a condemnation case—creates an *in rem* exception from sovereign immunity that extends to Indian Tribes. *See Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot. ex rel. Bd. of Tr. of Internal Imp. Tr. Fund*, 78 So. 3d 31, 33–34 (Fla. Dist. Ct. App. 2011); *Cass Cty.*, 643 N.W.2d at 693–94. That is incorrect. *City of Chattanooga* held that Tennessee could acquire, by condemnation, certain land owned in Tennessee by Georgia. 264 U.S. at 479. *City of Chattanooga* turned on the "consent" that States have provided to condemnation actions brought by another "sister state[]." *Id.* at 479–80. This Court has found a "surrender of immunity from suit by sister States" as "implicit" in the Constitutional Convention—a surrender rendered "plausible [by]

In fact, the Washington Supreme Court's "no interest" theory does not even work for most quiet-title-type actions determining property ownership. Sometimes, for example, plaintiffs will claim to have acquired title via adverse possession *after* the Tribe bought the property. *Cf. Armijo v. Pueblo of Laguna*, 247 P.3d 1119, 1122 (N.M. 2010) (plaintiff sought to quiet title against Tribe despite "prior quiet title decree" involving the Tribe's "predecessor in title" (quotation marks omitted)). Alternatively, an interpleader action may seek a judicial determination as to control of "tribal funds placed within the jurisdiction ... of a ... court." *First Bank & Tr.*, 313 P.3d at 1056. In many such cases, the Tribe had—at some point—an undisputed possession or ownership interest. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (holding that Indian Tribes are immune from interpleader actions).

These varied cases reinforce a deeper point. The reason that the Washington Supreme Court's *in rem* exception is facially inapplicable to so many *in rem* cases is that the exception itself is bankrupt. It cannot be squared with this Court's precedents, or the basic immunity principles they reflect. The Court should reject this exception in this case, and everywhere else it might be suggested.

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the mutuality of that concession." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991). But for Indian Tribes, that surrender never happened. *Id.* The appropriate analogy for Tribes is instead the United States—which, as noted above, is immune from condemnation suits by States. *See supra* at 10.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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